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Supreme Court of the United States.

THE TERRITORY OF HAWAII,
Appellant,

vs.

OZAKI MANKICHI,
Appellee.

Brief for Appellee in Reply.

These Memoranda are intended as answers to various suggestions made during the oral argument and partly embodied in the Points submitted by the Solicitor-General.

THE INSULAR CASES

Irrelevant to the contentions in this case.

The doctrine laid down in the several Insular cases is not invoked or brought in question in the present case.

De Lima v. *Bidwell* held that after cession by Treaty, Porto Rico ceased to be a foreign country in the contemplation of the tariff laws.

Downes v. *Bidwell* held that although territory annexed by Treaty ceased to be foreign, the mere cession did not make it an integral part of the United States to which the rule of uniformity of imposts applied, and that Congress could constitutionally legislate for such territory a tariff, without regard to the uniformity clause of the Constitution.

That was in effect what Congress did by the Joint Resolution annexing Hawaii. It annexed the territory, making applicable to its legislation the restrictions of

the Constitution, and excepting from such application the customs laws and regulations.

The claim made on behalf of Mankichi is not therefore in conflict with the doctrine of the Insular Cases and there is no occasion to discuss such doctrine in the present case.

There is no question here touching the power of Congress to govern "dependencies" or unincorporated territory.

That power was distinctly exercised by Congress in the passage of the Joint Resolution. The Constitution was made the test of the validity of Hawaiian legislation except in reference to the collection of imposts and the immigration of Chinese.

The rightful exercise of this power is not here disputed; the only question before the Court is as to the intent, effect and purpose of Congressional legislation passed in the exercise of that power.

In other words, did Congress intend by that provision of the Joint Resolution which declares that only such municipal legislation of Hawaii as is not contrary to the Constitution should remain in force, to make the provisions of the Constitution a test of the validity of legislation which permitted the trial of all persons accused of infamous crimes upon information instead of indictment and the conviction of such accused persons by a vote of nine jurors out of twelve?

THE INTENTION OF CONGRESS AS EXPRESSED IN THE JOINT RESOLUTION.

Mr. Justice White observed during the Argument that the Court must, of course, be at liberty to look into the consent and cession on the part of Hawaii, referred to in the Joint Resolution, in order to determine its intent and meaning.

This is unquestionably true. Fortunately the Joint Resolution itself recites the very conditions of the consent and cession.

In giving the insructions accompanying the Joint Resolution, Secretary William R. Day, under date of

July 8th, 1898, says (Appendix to Solicitor-General's Brief on Submission):

> "These recitals, it will be observed, are made in "the language of the Treaty of Annexation, con- "cluded at Washington on the 16th day of June, "1897. They, as well as the other terms of that "Treaty, were advisedly incorporated into the "Joint Resolution, because they embodied *the* "*terms of cession* which have not only been agreed "upon by the two Governments, but which have "also been ratified by the Government of the Re- "public of Hawaii. The Joint Resolution, there- "fore, accepts, ratifies and confirms, on the part of "the United States, the cession formally agreed to "and approved by the Republic of Hawaii." (H. R. Rep. No. 305, 56th Cong., 1st Session p. 3)

The plain intent of the conditions imposed and assented to should be carried out and we ask no more.

The terms of this consent and cession are in a proposed Treaty of June, 1897, signed by Secretary Sherman, on the part of the United States, and by three Commissioners on the part of Hawaii. (Senate Report, No. 681, 55th Congress, 2nd session, March 16th, 1898, pp. 96 and 97).

The preamble to this Treaty expresses the "desire of the Government of the Republic of Hawaii that those Islands should be incorporated into the United States *as an integral part thereof and under its sovereignty,*" and that the two Governments "have determined to accomplish by Treaty an object so important to their mutual and permanent welfare."

The remainder of the Treaty contains the exact language reproduced by the Joint Resolution, including the provision that only such municipal legislation of the Hawaiian Islands, not inconsistent with the Treaty nor contrary to the Constitution of the United States, should remain in force.

A previous Treaty of Annexation negotiated in 1854, under President Pierce, Mr. Marcy being Secretary of State, contemplated the conferring of full statehood on the Hawaiian acquisition, and contained a similar provision, to wit:

"Article VII. The laws of the Hawaiian King-
"dom so far as they are compatible with Repub-
"lican institutions and conformable to the Consti-
"tution of the United States, shall be and remain
"in full force and effect until modified, changed
"or repealed by the legislative authority of the
"State contemplated by this Treaty." (Senate Report cited above, pp. 91 and 92).

Secretary Sherman in his Report to President McKinley accompanying and recommending the Treaty of 1897, says:

"There remained therefore the annexation of
"the Islands and their complete absorption in the
"political system of the United States as the only
"solution satisfying all the given conditions and
"promising permanency and mutual benefit. *The*
"*present Treaty has been framed on that basis.*
"(p. 75). As in previous instances when the
"United States has acquired territory by Treaty,
"it has been necessary to reserve all the organic
"provisions for the action of Congress. If this
"was requisite in the case of the transfer to the
"United States of a part of the domain of a titular
"sovereign, as in the cession of Louisiana by
"France, of Florida by Spain, or of Alaska by
"Russia, it is more requisite when the act is not
"cession but *union involving the complete incor-*
"*poration of an alien sovereignty into the body*
"*politic of the United States.*

"For this the only precedent of our political
"history is found in the incompleted Treaty during
"President Grant's administration of November
"29th, 1869, for the annexation of the Domini-
"can Republic to the United States.

"Following that example the Treaty now signed
"by the plenipotentiaries of the United States and
"the Republic of Hawaii reserves to the Congress
"of the United States the determination of all
"questions *affecting the form of government* of the
"annexed territory, the *citizenship* and elective
"franchise of its inhabitants and *the manner in*
"*which the laws of the United States* are to be ex-
"tended to the Islands. (p. 76).

"It was necessary to stipulate, as in the Domini-
"can precedent, for continuing the existing *ma-*
"*chinery* of the government and laws in the Ha-

"waiian Islands until provision shall be made by "law for the government, as a Territory of the "United States, of the *domain thus incorporated* "*into the Union;* but having in view the particu- "lar status created in Hawaii by laws enacted in "execution of Treaties heretofore concluded be- "tween Hawaii and other countries, *only* such Ha- "waiian laws are thus provisionally continued as "shall not be incompatible with the Constitution "or laws of the United States, or with the provis- "ions of this Treaty." (p. 76). (Senate Document cited above, pp. 75 and 76).

In addition to this evidence from Secretary Sherman showing the intent of the Treaty to be the "complete absorption of the Islands in the political system of the United States," the complete incorporation of an alien sovereignty into the body politic of the United States, the incorporation of the Hawaiian Islands into the Union, we have the Message of President McKinley of June 16th, 1897, to the Senate, accompanying the Treaty, in which he says:

"Not only is the union of the Hawaiian Terri- "tory to the United States no new scheme, but it "is the inevitable consequence of the relations "steadfastly maintained with that mid-Pacific do- "main for three-quarters of a century; its accom- "plishment, despite successive denials and post- "ponements, has been merely a question of time. "While its failure in 1893 may not be a cause of "congratulation, it is certainly a proof of the dis- "interestedness of the United States, the delay of "four years having abundantly sufficed to estab- "lish the right and the ability of the Republic of "Hawaii to enter as a sovereign contractant upon "a conventional union with the United States, thus "realizing a purpose held by the Hawaiian people "and proclaimed by successive Hawaiian Govern- "ments through some twenty years of their virtual "dependence upon the benevolent protection of the "United States. *Under such circumstances, an-* "*nexation is not a change, it is a consummation.*" (Senate Document last cited, p. 66).

In proposing the Treaty of 1893, the Hawaiian Commissioners wrote to Mr. Foster, Secretary of State,

under date of Washington, February 4th, 1893, stating the proposals of the Hawaiian Government for such a Treaty.

Article 11 of these proposals is:

> "That all laws *and the system of criminal and* "*civil jurisprudence* in force in the Hawaiian "Islands at the date of the ratification of such "Treaty which are not specifically abrogated or "modified by the terms of the Treaty *or which* "*are not inconsistent with the Constitution of the* "*United States,* shall remain in force until the "same are regularly repealed by the appropriate "authority." (Senate Document, No. 76, 52nd Congress, 2nd session; Papers relating to the Annexation of the Hawaiian Islands, 1893, pp. 39 and 40).

The Treaty of 1893, as finally negotiated by Mr. Foster, did not contain the provisions found in the earlier Treaty of 1854 and in the later Treaty of 1897 for abrogation of any Hawaiian legislation inconsistent with the Constitution. This is explained by the following passage from Secretary Foster's letter to President Harrison, accompanying the Treaty:

> "As there is no provision in the existing legis- "lation of Congress *whereby the Executive power* "*can provide an organized form* of government for "new territory annexed to the Union, *or extend* "*over it the laws of the United States* and cause "the same to be executed, it was deemed necessary "to continue the existing government and laws of "the Hawaiian Islands *until Congress should have* "*an opportunity to legislate on the subject;* but a "provision has been inserted in the Treaty for the "exercise by the Executive of the United States "of a veto power upon the acts of that government "during the interregnum." (Annexation of the Hawaiian Islands, 1893, pp. 5 and 6).

This referred, it will be noted, to the operation of a *Treaty,* and the power of the *Executive* to provide a Government for Hawaii, and extend the laws of the United States over it; it assumes the right of *Congress* to do so.

In the present case we have a proposal from Hawaii, in the form of an executed Treaty, for a cession of territory, upon certain conditions, including the continuance of such municipal legislation as was not contrary to the Constitution. This Treaty was not ratified by the Treaty-making power; but *Congress* took into account the proposals which it contained, and in the exercise of its conceded power, accepted the cession of the territory *on the conditions named by Hawaii* and did, what Mr. Foster says was beyond the power of the Executive to do, to wit: "legislated upon the subject," and by the plain terms of the Joint Resolution provided some form of government and imposed upon the Territory the will of the President as to the officers of such government and as to "the manner in which they should exercise" their offices; imposed upon the Territory the laws of the United States as to the immigration of Chinese, and "legislated" that only such municipal laws should remain in force as were "not contrary to the Constitution."

The Joint Resolution, it will be recalled, provides for the appointment of Commissioners to recommend to Congress such legislation as may be deemed necessary or proper. From the Report of this Commission in 1898 (pp. 16 and 17), we quote those passages which explain why in the Organic Act, two sections, sections 5 and 6, were inserted in which reference was made to the binding force of the Constitution of the United States, as is already noted in pages 10 and 11 of "Additional Brief for Appellee."

> "The existing laws of Hawaii not inconsistent
> "with the Constitution and the laws of the United
> "States or of this act shall continue in force subject
> "to repeal or amendment by the legislature of
> "Hawaii or by Congress." (p. 16).

This, as will be seen, is the exact equivalent of the language of the Joint Resolution, and is found in Section 6 of the Organic Act.

In reference to the provision in Section 5 of the Organic Act the Commissioners say:

"The bill provides that the Constitution and "laws of the United States locally applicable shall "have the same force and effect in the Territory of "Hawaii as elsewhere in the United States." (p. 16).

"This is the usual provision found in the Acts "of Congress providing for the establishment of "territorial governments in the United States here-"tofore. Such a provision is very important in "this bill for many reasons, among which may be "mentioned the continued importation of Coolie "Labor into Hawaii. It has been the policy of the "Government of Hawaii before and since the es-"tablishment of the Republic *to import men under "labor contracts* for a term of years, at the expira-"tion of which time they are to return to the coun-"tries from which they came. Those brought in "are mainly from China and Japan. (p. 16).

"Of course it becomes necessary *to extend our "labor laws over the island* so as to prohibit all "kinds of foreign contract labor from coming to "the territory, first, because it is the policy of this "country to keep out all kinds of cheap foreign "labor, including Coolie Labor and thereby pre-"vent such labor from interfering with the wages "of American labor, and secondly, to protect our "manufactured products from competition with "manufactured goods produced by cheap alien "labor. The general laws of the United States "will place the people of the Territory on the same "footing with the people of the States and of other "Territories of the United States in regard to for-"eign labor." (pp. 16 and 17, Report of Hawaiian Commission, 1898).

These extracts, we respectfully submit, explain clearly why in the Organic Act, Congress inserted, in addition to the language of the Joint Resolution, the section specifically extending the Constitution *and the laws* of the United States over the Territory.

Finally, the necessity for further legislation, such as is found in the Organic Act, is explained by the Report of the House Committee on Territories (H. R. Report, No. 305, 56th Congress, 1st session, February 12th, 1900), recommending the passage of the Territorial Government Act.

We quote from this Report at pages 4 and 5:

"There is imperative need of early enactment "of an Organic Act for Hawaii. The Joint Reso- "lution of July 7th, 1898, providing for the an- "nexation of the Hawaiian Islands declares that "the Hawaiian municipal laws not contrary to the "United States Constitution or inconsistent with "the terms of that Resolution, remain in force "until Congress enacted laws. (p. 4.)

"Meanwhile it has become apparent that there "is much doubt of the extent of the power granted "to the local government of Hawaii by the pro- "visions of the Joint Resolution, and that in many "important respects there is something like an "interregnum in Hawaii. (p. 4.)

"Many doubtful questions of admiralty and "maritime jurisdiction have arisen as well as crim- "inal procedure, rendering it uncertain whether "there is now any tribunal for the decision of im- "portant questions affecting property and any "existing method by which criminals may be in- "dicted or legal juries impaneled for their trial." (p. 5).

The report continues to the effect that there was grave doubt in regard to a number of other governmental powers, including the granting of franchises, disposition of public lands, operation of the Homestead Law, importation of Japanese laborers, etc. (p. 5).

It seems apparent from these extracts from the Committee's Report that any additional provisions in the Organic Law were not meant to confer new powers, but to supply the customary details of legislation and, at most, to set at rest any doubts that had arisen in the interpretation of the Joint Resolution.

Had it been otherwise, the Committee would have called the attention of Congress to the necessity of providing for what had been left unprovided for, instead of raising doubts as to the purpose and effect of the legislation embodied in the Joint Resolution.

RESTRICTIONS OR EXCEPTIONS IN JOINT RESOLUTION.

All the conditions imposed by Hawaii to the annexation are repeated in and accepted by the Joint Resolution, such as the immediate extension of constitutional privileges to the Islands; the subsistence of their land laws and customs relations; the prohibition of the immigration of Chinese.

This may create a situation analogous to that pointed out by Mr. Justice White's opinion in Downes *v.* Bidwell, as controlling the Territory of Louisiana; although Louisiana was fully incorporated under the Act of 1805, certain commercial privileges were allowed French and Spanish vessels, which would be incompatible with the uniformity required by the Constitution; as to these privileges only, the incorporation was held in abeyance.

This, Mr. Justice White observed from the bench, was owing to the obligations of the Treaty which Congress respected. The analogy between the two cases seems complete, for in the present case Congress respected the conditions embodied in the Treaty Agreement with Hawaii, which conditions imposed the exceptions referred to.

Whether such restrictions are valid or invalid,—whether it is within the power of Congress to impose them, is of no moment; their invalidity would not affect the privileges conferred by the Joint Resolution; if invalid, then incorporation might be complete; if valid, then only the rights or privileges excepted can be refused to such territory.

The Legislative as well as all other "civil powers" was included in the clause which prescribed that these various powers should be exercised "in such manner as the President of the United States shall direct," and in accordance with such power, before the time fixed for the meeting of the Legislature, President McKinley prorogued it. (Solicitor-General's Point XII). It is clear that by the exercise of the same power, the President could have called it together at any time, upon a day's notice if need be, and if on the passage of the

Joint Resolution, it had been requisite to pass any act for changing the criminal procedure, the Legislature under the new Government, of which it formed a part, could readily have been summoned for that purpose.

THE JOINT RESOLUTION PROVIDED A GOVERNMENT FOR HAWAII.

The Solicitor-General has laid some stress upon the proposition that until the Organic Act went into operation the Government of the Republic of Hawaii continued, and that then, for the first time, was there any government of the Hawaiian Islands provided for or undertaken by Congress.

This is a great mistake. The Joint Resolution provided very emphatically for the Government of Hawaii, under the authority of the United States.

All the civil, judicial and military powers exercised by the officers in the Islands were vested in the appointees of the President of the United States, and all such powers were to be exercised "*in such manner as the President of the United States shall direct.*"

The President was given absolute power to remove all such officers and to fill vacancies.

This was clearly a government of the Hawaiian Islands under the authority of the United States.

Under this power, as we have seen, he prorogued the Legislature. He re-appointed the officers "of the Republic of Hawaii *as it existed* just prior to the transfer of sovereignty." He required all such officers to take an oath of allegiance to the United States. He required all bonded officers to renew their bonds to the Government of the United States. (Sec'y Day's Instructions—Appendix to Solicitor-Genl's Brief on Submission—pp. 33-34.)

All existing Treaties of the Hawaiian Islands were abrograted; further immigration of Chinese into the Islands was prohibited "except upon such conditions as are now or may hereafter be allowed *by the laws of the United States;*" certain legislation of the Islands was continued in force by virtue of the Joint Resolution,

to wit, the customs laws and all other legislation not inconsistent with the Constitution. In other words, Congress re-enacted, as its own, all the municipal legislation of Hawaii not contrary to the Constitution; it re-enacted the customs laws and regulations of Hawaii; it enacted a law prohibiting the immigration of Chinese.

All these are Supreme Acts of Government and the law under which they could lawfully be done most certainly established a system of Government for Hawaii, however temporary in its duration.

As the Solicitor-General admits, the Commissioners might never have recommended any further legislation; to quote his language: "it was not even known whether a new house would be needed." (close of Point V).

The authority given to the President in the Joint Resolution to appoint Commissioners to "recommend to Congress such legislation concerning the Hawaiian Islands as they *shall deem necessary or proper*" (p. 9), the Solicitor-General considers as establishing the fact that "until such time as Congress, acting upon the recommendations of the five Commissioners, should frame a permanent government under which the Islands might be incorporated into the United States," Hawaii could not be so incorporated.

But what if these Commissioners should not deem any legislation "necessary or proper"? They were to be the judges as to whether any legislation was requisite or useful, and they might well have been content with the municipal legislation of Hawaii as controlled and limited by the Joint Resolution. In such a case would there have been no incorporation, and would the provision of the Joint Resolution, to which we have alluded, have remained barren and ineffective?

The Territorial Act of April 30, 1900, usually referred to as the Organic Act, simply provided further government. The government first established was temporary; the government established by the Organic Act was meant to be permanent. This was the understanding of the House Committee that reported the Organic Act, as will be seen from this pertinent quotation:

> " The language of the Joint Resolution shows " that the *government provided* was intended as an " expedient to cover the time that must elapse be- " tween the passage of the Resolution and the estab- " lishment of a permanent form of government, " and the nature of the *temporary government* is " such that it ought not to continue longer than is " required by absolute necessity." (p. 4, Report of Committee on Territories, H. R., February 12, 1900).

The Government of Hawaii was indeed, as the President intended, "continued without interruption," *but not without change*. From the time of the Joint Resolution the sovereignty of Hawaii had passed away, and the territory was under the sovereignty of the United States and governed by its Federal agencies.

COMMON LAW RIGHT TO IMPANEL GRAND JURIES:

It has been urged that there was no "statute" in Hawaii providing for the impaneling of grand juries and that this would be an obstacle to the administration of justice if Mankichi's claim prevails.

The case of the U. S. v. Hill, 1 Brock., 156, 159, decided by Chief Justice Marshall, at Circuit, would seem to settle that question as it sustains the right of a Court having criminal jurisdiction to do whatever is necessary for its exercise, *i. e.*, to impanel such grand and petit juries as may be requisite for the proper exercise of its jurisdiction.

This position is further maintained by this Court in United States *v.* Clawson, 114 U. S., 486, which goes farther than the case of the United States *v.* Hill.

In the Clawson case, from Utah, it appeared that the impaneling of grand and petit juries *was* regulated by Statute, which provided how the list should be made up and the juries drawn; the jury lists made up in conformity with this Statute were exhausted and the Court exercised the common law power of additional venires; eleven out of twelve jurors who tried Clawson were selected from these additional panels and only one out of

the panel made up from the Statutory list. Upon exception to this method as contravening the Statute which regulated the summoning and impaneling of jurors this Court held that after exhausting the means provided by the Statute the Court had power to resort to common law methods to procure the juries necessary for the exercise of its criminal jurisdiction.

The Common Law of England was made the law of Hawaii, except as altered by Constitution or Statute (Solicitor's Point XIII); the criminal procedure was altered by Statute so as to diminish the rights and immunities accorded to the accused by the Common Law and accorded by the Constitution of the United States to all persons subjected to prosecution under authority of the Federal Government.

These Statutes could not remain in force after the Joint Resolution, and the common law rules, unaffected by them, took their place.

COMPOSITION OF JURIES.

Counsel for the Territory of Hawaii urge that if Mankichi's contention is sound, it would have been impossible to obtain grand or petit juries in Hawaii, as such juries must be composed of citizens, and there were not enough citizens of the United States in the Islands to make up the juries.

There is no constitutional provision requiring juries —grand or petit—to be made up of citizens.

The utmost that the common law required of a juror was that he should be a free and lawful man, generally a freeholder. This did not require the attributes of citizenship. It did not require a man possessing all the political rights and privileges of a citizen. What it required was allegiance to the King. In other words, *non-alienage*. Throughout the United States the qualification of a juror has been again and again recognized as sufficient if he is an "elector," and in many States residents are allowed to be "electors" who are not naturalized or native citizens.

By the Northwest Ordinance, persons who have re-

sided a certain period and are freeholders are allowed to be "electors" and citizens of the United States are allowed to be "electors"; it is obvious that either of these categories, both placed upon an equal footing as to the electorate, would, in the absence of any Statute prohibiting it, be equally qualified for jury duty.

The qualifications of jurors and all the regulations for the impaneling of juries are matters of local concern and local jurisdiction. The Constitution of the United States, as we have said, contains no prescription in reference thereto. The laws of the United States prescribe that for all Courts of the United States the regulation of the various localities where they sit shall control the selection and qualification of jurors; in territories local territorial acts regulate the question.

Under these circumstances, when Hawaii became a part of the United States by the operation of the Joint Resolution, all native born inhabitants of Hawaii ceased to owe any allegiance to the former Republic of Hawaii and owed allegiance to the United States; there was no other sovereignty in the Islands than the sovereignty of the United States. Under the strictest rule, therefore, native inhabitants of the Hawaiian Islands, owing allegiance to the Government of the United States, would be competent jurors.

Moreover, as the qualification of jurors and the rules for impaneling the juries are matters of local concern, they were governed in Hawaii by the local laws then in force; these local laws were not "contrary to the Constitution," for the Constitution does not prescribe the qualifications of jurors; they therefore remained in force by the express provision of the Resolution, and under those local laws juries could be impaneled and the qualification of jurors determined.

There was therefore no such practical difficulty as our opponents depict in getting competent grand and petit juries to indict and to try all persons accused of crime.

FUNDAMENTAL RIGHTS—THE STATES AND THE GENERAL GOVERNMENT.

It is insisted by the Solicitor-General that the purpose of the restriction in the Joint Resolution forbidding that any municipal legislation should remain in force which was contrary to the Constitution, was merely to declare that certain

> " fundamental rights and principles, the basis of all
> " free government, which cannot with impunity be
> " transcended,"

were protected in Hawaii. (Point XI.)

He insists that this

> " follows naturally and irresistibly from other
> " provisions of the Resolution * * * because
> " by the cession the Islands became subject to the
> " dominion of the United States and there are cer-
> " tain limitations of the Constitution which apply
> " wherever the jurisdiction of the United States
> " extends." (Point IX).

If these limitations of the Constitution applied " naturally and irresistibly," then the provision of the Joint Resolution was of *absolutely no effect;* it meant nothing, it accomplished nothing, it added no force to the protection and no certainty to the rights intended to be protected. This construction simply eliminates the phrase from the Joint Resolution.

On the other hand, when we come to the discussion of what are the fundamental rights, which, according to the Solicitor-General, are "naturally and irresistibly" to be protected wherever the jurisdiction of the United States extends, we find that there is difference of opinion, doubt and uncertainty; he frankly admitted on the argument that he could not define them, that the Court had not defined them, and a like frank statement is to be found in his argument of the Insular Cases, 182 U. S., at page 156.

Under these circumstances the provision in the Joint Resolution becomes natural, proper and effective; it signifies that whatever may be the doubts as to which

fundamental rights are protected by the spirit of the Constitution, there shall be no question as to what rights shall be protected in Hawaii; and any legislation violative of any right which can find an asylum in any nook or corner of the Constitution is set at naught.

A few words more in reference to fundamental rights may be permissible here. It is not a question of "natural rights" or of the "fundamental rights" of man, but of the *fundamental rights of all men living under the sovereignty of the United States, as against the agencies of the Federal Government.*

These are illustrated by the earliest compact for the protection of those rights—the Northwest Ordinance. This Ordinance was made, to quote from its language, for the purpose of

> "extending the fundamental principles of civil and
> "religious liberty which formed the basis whereon
> "these Republics, their laws and Constitutions, are
> "erected."

In the statement of these fundamental principles contained in Articles I and II, we find:

The right not to be molested on account of one's mode of worship or religious sentiment;

The right to the writ of habeas corpus;

The right to a trial by jury;

The right not to be deprived of liberty or property but by the judgment of one's peers.

These are, as this Court said in McAllister *v.* U. S., 141 U. S., at p. 188, among the

> "essential principles *upon which our system of*
> "*government rests,* and which are embodied in the
> "Constitution."

If we have not entirely misunderstood both the Ordinance and this decision, among the "fundamental rights which form the basis whereon these Republics, their laws and Constitutions, are erected," among the "essential principles upon which our system of government rests, and which are embodied in the Constitu-

tion," is the right of everyone living under the sovereignty of the United States to be free from any prosecution for crime at the hands of the central authority to which the Government of the Union was deputed, unless after indictment by a grand jury of his fellows; and, the right to be acquitted, unless found guilty by the unanimous verdict of a petit jury of twelve.

That these rights have not always been respected by the various States is to be deplored, and it is perhaps to be deplored that in surrendering various privileges of sovereignty to a Central Government the States did not clearly surrender the right to accusation and trial by any other means than those consecrated by Magna Charta.

However this may be, it is quite enough that the States should have reserved and should be permitted such a privilege; it is very clear that no such right or privilege was *granted* to the Federal Government or to any of its governmental agencies.

The language of Callan *v.* Wilson, 127 U. S., at pp. 549 and 550, is apposite on this point:

> "As the guarantee of a trial by jury, in the third "article, implied a trial in that mode and accord- "ing to the settled rules of the common law, the "enumeration, in the Sixth Amendment, of the "rights of the accused in criminal prosecutions, "is to be taken as a declaration of what those rules "were, and *is to be referred to the anxiety of the "people of the States* to have in the supreme law "of the land, and *so far as the agencies of the Gen- "eral Government were concerned,* a full and dis- "tinct recognition of those rules, as involving the "fundamental rights of life, liberty, and property."

The fact that the State may restrict the privilege of its citizens to the intervention of grand and petit juries, the Solicitor-General makes the basis of the question: Why, if the constitutional guarantees do not tie the hands of the inhabitants of a Territory when organizing a State, should they be held to tie the hands of Congress with regard to the Territory?

This was the point urged in Thompson *v.* Utah. Utah as a Territory was only doing what a State of the

Union might lawfully do under the Constitution, and yet this Court held that, as a Territory, it could not do what it afterwards did as a State.

The answer to the Solicitor's doubt seems clear. It is because the State *governs itself*,—by the vote of its own citizens and the privilege of self-government consists in the right of a State to govern itself as its people see fit, while the government of organized Territories or of annexed territory by a Central Power, without any direct voice of the people governed, is in its nature and essence unrepublican and of dangerous tendency, and the exercise of such a power, if it must be borne at all, is to be properly circumscribed by such constitutional limitations as have been placed upon the Central Government by the people who organized it.

Reference was made to the Instructions of President McKinley to the Philippine Commission as embodying a statement of some of the fundamental principles which are everywhere entitled to protection. It must be borne in mind that at the date of these Instructions, military commanders were the organs of government and the source of authority in the Philippine Islands.

> "It is probable," said Mr. McKinley, "that the "transfer of authority from military commanders "to civil officers will be gradual and will oc- "cupy a considerable period. Its accomplishment, "and the maintenance of peace and order in the "meantime, will require the most perfect co- "operation between the civil and military authori- "ties in the Islands, and both should be directed, "during the transition period, by the same Execu- "tive Department."

It is not necessary here, with reference to the rights of the Appellee, Mankichi, to discuss the legality or the wisdom of the government of the Philippines, nor is it necessary to withhold a tribute to the earnest efforts of the authorities to deal honorably and efficiently with a situation of unusual difficulty and complication. It is sufficient for our present purpose to show that Mr. McKinley's efforts were to reconcile a condition of insurrection in a newly-acquired territory with the extension of such civil rights as he thought would tend to the

pacification of misguided men and yet not act as an encouragement to malicious men.

With this desire, he instructs the Commission to bear in mind the "happiness, peace and prosperity of the people of the Philippine Islands," and recommends that "the measures adopted should be made to conform to "their customs, their habits and even their prejudices, "to the fullest extent consistent with the accomplish- "ment of the indispensable requisites of just and effect- "ive government;" but even with this desire not to disturb the habits of ages he insists that "there are certain great principles of government which have been made the basis of our governmental system," and such of these as can, in his opinion, reasonably be made applicable in the Philippines he instructs the Commission always to respect. Among these are the rules

> "that in all criminal prosecutions, the accused "shall enjoy the right to a speedy and public "trial, to be informed of the nature and cause "of the accusation, to be confronted with the "witnesses against him, to have compulsory "process for obtaining witnesses in his favor "and to have the assistance of counsel for his "favor and to have the assistance of counsel for his "defense; that excessive bail shall not be required, "nor excessive fines imposed, nor cruel and unu- "sual punishment inflicted; that no person shall be "put twice in jeopardy for the same offense or be "compelled in any criminal case to be a witness "against himself."

According to the contention of the honorable Solicitor-General none of these "great principles of government which have been made the basis of our governmental system" were operative in Hawaii after the passage of the Joint Resolution, although this Resolution distinctly made the Constitution of the United States the criterion of the validity of all legislation there,—a situation far in advance, as regards incorporation into our Union, of the situation in the Philippines.

THE ROSS CASE:

Is this case authority for holding that Congress may authorize trials of criminals in other ways than required by the Constitution? It is not, for this reason: The injunctions of the Constitution upon Congress relate only to actions within the jurisdiction and sovereignty of the United States; Congress had no jurisdiction or sovereignty in Japan; it was the sovereignty of Japan that tried and condemned Ross; by courtesy, comity or Treaty, Japan permitted the displacement of its laws and they adopted at our instance some safeguards unknown to their usual legislation in the trial of American criminals; those safeguards became for the moment Japanese law, enforced by a Japanese sovereignty. No constitutional privileges, no statutory requirements were of avail in Japan, except such as Japan chose to adopt as its own law for the occasion. Congress therefore transcended no constitutional prerogative in providing the officials whom Japan was willing to invest with judicial functions within its sovereignty.

There was no such situation in Hawaii; there was no Hawaiian sovereignty after the 7th of July, 1898; the only sovereignty there was the sovereignty of the United States exercised by Congress, not by the permission of Hawaii, but because of the abandonment and surrender of Hawaiian sovereignty to the United States.

INCORPORATION.

It is not necessary to the protection of Mankichi's rights that Hawaii should have been incorporated into the Union, under the theory of the concurring opinion in Downes *v.* Bidwell.

It is sufficient that Congress, in the exercise of a power which this Court has recognized, should have conferred upon Hawaii such constitutional rights or privileges as would insure to its inhabitants the protection of the criminal procedure to which the Federal Government was itself restricted.

It may not, however, be out of place to call attention

to the Treaty which Government counsel have invoked as establishing the conditions upon which Congress attached the Territory of the Hawaiian Islands to the United States and acquired sovereignty over that Republic.

> The preamble of the Treaty states that "the "United States and the Republic of Hawaii, in "view * * * of the expressed desire of the "Government of the Republic of Hawaii that those "Islands should be *incorporated into the United "States as an integral part thereof*, and under its "sovereignty, have determined to *accomplish by "Treaty an object so important* to their mutual and "permanent welfare."

The purpose and object of the Treaty was therefore clearly to incorporate the Territory and to make it an *integral part* of the United States. Possibly the fear that this could not be accomplished by the Treaty-making power is responsible for the adoption of another method, and for the interposition of both branches of Congress, by means of the Joint Resolution.

Although that specific language was not reintroduced into the Resolution, the essential bond of union which that language imported, to wit, the application of the Constitution of the United States to the Territory so acquired, was an element of the annexation; and there is no peculiar virtue in that form of words to carry with them greater or other privileges than their equivalents in other forms.

For instance, it was suggested during the argument by Mr. Justice White, when the Solicitor-General declined to be responsible for any form of language effecting incorporation, that the language of the Northwest Ordinance,—that the Territory should always be a part of the United States,—was effective to incorporate. To this it may be observed, that the language of the Northwest Ordinance did not *make* that Territory a part of the United States; the Territory already belonged to several of the original States; it was already a part of the confederacy, —the United States in its present form did not yet exist. The exact language is this:

"Art. IV. The said territory and the states
"which may be formed therein shall *forever remain*
"a part of this confederacy of the United States of
"America, subject to the articles of confederation
"and to such alterations therein as shall be consti-
"tutionally made."

This stipulation did not create any new status of "incorporation;" it merely concluded a compact that such status should never be disturbed; it did not incorporate; at most, it stipulated against disintegration.

Such as it was, however, it is not to be found in the Organic Act for the Government of Hawaii any more than in the Joint Resolution; and the Organic Act, it is admitted by counsel for the Government, did make the Territory an integral part of the United States.

We have seen nothing in the arguments presented that shakes our confidence in the simple proposition that Congress, in the exercise of its power of government over territory of the United States, has chosen to enact for that Territory such legislation as shall invest all its inhabitants with the privileges and immunities guaranteed by the Constitution against the action of the general government; and that this action of Congress was lawful; was within its rights and attributes, and gave to Mankichi, the appellee, the right to be free until accused of crime by a grand jury of the country, and to be liberated from such accusation, unless found guilty by the unanimous verdict of a petit jury.

Dated New York, March 12th, 1903.

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